RHB TRUSTEES BHD v. OILFAB SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[CIVIL SUIT NO: 22NCVC-41-01-2014]
15 MAY 2015

CIVIL PROCEDURE: *Documents – Without prejudice – Admissibility of – Letters exchanged during negotiation of settlement – Whether privileged communication – Whether could be admitted in evidence if settlement did not materialise – Whether merely marking a document "without prejudice" would exclude it from admission as evidence – Whether there was a sine quo non element of dispute – Whether there was an attempt towards settlement between parties*

Bonds called *murabahah* underwritten notes of up to RM200,000,000 ('MUNIF') were issued by one Straight A's Portfolio Sdn Bhd ('SAP'). They were fully subscribed by MIDF Amanah Investment Bank Berhad ('MIDF') and Bank Kerjasama Rakyat Malaysia Berhad ('Bank Rakyat') (collectively called 'noteholders') equally. The plaintiff was appointed the trustee of the MUNIF. Under the trust deed, SAP was to open and maintain a master revenue account to be operated solely by the plaintiff for the purpose of capturing all proceeds from invoices assigned by Oil-Line Engineering & Associates Sdn Bhd ('OLEA'). As security for the MUNIF, there were some assignments of certain income and receivables from OLEA to the plaintiff. In breach of the assignments, a portion of the assigned proceeds were wrongly applied towards D1's land and D2's lands respectively instead of being paid into the master revenue account. At the material time, SAP as well as D1 and D2 shared the same holding or ultimate holding company in Oilcorp Berhad ('Oilcorp'). The plaintiff prayed for, *inter alia*, a declaration that D1 and D2 held their respective lands in trust for the plaintiff and for consequential reliefs for the sale of the lands or the retention of proceeds of sale of the lands. In the course of preparation for trial, the plaintiff sought to introduce two letters with the label 'without prejudice' written on it. The defendants vigorously objected and *vide* two separate applications applied to exclude the letter dated 24 November 2009 issued by Oilcorp to MIDF and the letter dated 25 March 2010 written by MIDF to Oilcorp.

Held (dismissing both applications with costs):

(1) Communications made on a without prejudice basis should be excluded from the evidence to be produced at trial if a settlement does not materialise; otherwise no parties would want to negotiate at all for fear that what was proposed in the process of negotiation would be led in evidence by the party trying to gain an advantage to prove its case to the detriment of the other. However, merely marking a document 'without prejudice' does not necessarily mean that the document would be excluded from admission as evidence as to its contents. There must be a dispute at the time the letter was issued and a genuine attempt to resolve it. (para 16)

(2) The use of the label 'without prejudice' was not determinative that a document bearing that label would be inadmissible for the purpose of trial or that it would be excluded from the proposed bundle of documents to be filed for the trial. There must be present the *sine quo non* element of a dispute between the parties and an attempt towards settlement. (para 30)

(3) At the time the Oilcorp letter was issued purportedly on 25 November 2009, the MUNIF was not in default. So far as D1 was concerned, the plaintiff had only demanded for payment on 8 February 2013. D1 never averred in any of its affidavits on whether the amount owing was disputed at the time the Oilcorp letter was issued. Since there were no disputes pending wherein negotiations were still afoot, both the Oilcorp letter and the MIDF letter were allowed to be included in the bundle of documents to be filed. (paras 31 & 86)

Case(s) referred to:

A-B Chew Investments Pte Ltd v. Lim Tjoen Kong [1989] 2 CLJ 1109; [1989] 2 CLJ (Rep) 840 HC ***(refd)***

Boscawen and others v. Bajwa and another; Abbey National Plc v. Boscawen and others [1995] 4 All ER 769 ***(refd)***

Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors [1999] 2 CLJ 749 HC ***(refd)***

Halim Securities Sdn Bhd v. Ng Seng Boon (Lamp 16) [1999] 1 LNS 309 HC ***(refd)***

Malayan Banking Bhd v. Foo See Moi [1981] 1 LNS 95 FC ***(refd)***

Mosbert Berhad (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***

Re Daintrey, ex p Holt [1893] 2 QB 116 ***(refd)***

Rush & Tompkins Ltd v. Greater London Council [1988] 3 All ER 737 ***(refd)***

Shencourt Sdn Bhd v. Perumahan NCK Sdn Bhd [2008] 3 CLJ 582 CA ***(refd)***

Sinojaya Sdn Bhd v. Metal Component Engineering Pte Ltd [2003] 1 SLR 281 ***(refd)***

Ted Bates (M) Sdn Bhd v. Balbir Singh Jholl [1976] 1 LNS 157 FC ***(refd)***

Wong Nget Thau & Anor v. Tay Choo Foo [1994] 4 CLJ 617 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 176(10)

Contracts Act 1950, s. 2(d)

Evidence Act 1950, ss. 23, 129

Rules of Court 2012, O. 18 r. 7 , O. 34 r. 2(2)(i), O. 41 r. 6, O. 92 r. 4

Evidence Act [Ind], s. 23

Other source(s) referred to:

Halsbury's Laws of Malaysia, 2006 Reissue, vol 21, p 214

Malaysian Civil Procedure, 2013, p 533

Sarkar's Law of Evidence, 1993, 14th edn, vol 1, p 359

For the plaintiff - Lim Siew Ming (Loke Yuen Hong with her); M/s Raja Darryl & Loh

For the 1st defendant - Leong Kwong Wah (Norlidah Abu Bakar with him); M/s Leong Kwong Wah

For the 2nd defendant - Afdhilani Jusoh; M/s Faizul Nasir & Assocs

Reported by Amutha Suppayah

JUDGMENT

Lee Swee Seng J:

[1] This is yet another problem arising out of the issuance of some bonds with no proper ring-fencing in place. In this case, the bonds called *murabahah* underwritten notes of up to RM200,000,000 ("MUNIF") were issued by one Straight A's Portfolio Sdn Bhd ("SAP"). They were fully subscribed by MIDF Amanah Investment Bank Berhad ("MIDF") and Bank Kerjasama Rakyat Malaysia Berhad ("Bank Rakyat") collectively called 'noteholders' equally. Under the trust deed that was executed by the parties, the plaintiff was appointed the trustee of the MUNIF. The first defendant ("D1") and the second defendant ("D2") D'Tiara Corp Sdn Bhd are not parties to the trust deed or any related documents prepared to secure the payments to the plaintiff as trustee.

[2] Under the trust deed, the issuer SAP was to open and maintain a master revenue account which shall be operated solely by the plaintiff for the purpose of capturing all proceeds from invoices assigned by one Oil-Line Engineering & Associates Sdn Bhd ("OLEA") and its subsidiaries ("OLEA Group"). As usual, upon a declaration of an event of default under the trust deed, the plaintiff shall have the right to demand for all sums due and owing from the issuer and to take such legal proceedings against the parties liable. As security for the MUNIF, there were some assignments of certain income and receivables from the OLEA Group to the plaintiff.

Problem

[3] In breach of the assignments in or about 2009, a portion of the assigned proceeds amounting to about RM14 million and about RM3 million were wrongly applied towards D1's land and D2's lands respectively instead of being paid into the master revenue account, which details are found in para. 11 of the statement of claim. Plaintiff further pleaded that both D1 and D2 knew or ought to have known that the sums of about RM14 million and RM3 million respectively that were applied towards their lands respectively have been assigned to the plaintiff and that they knew or ought to have known of the terms of the assignments. The plaintiff detailed in para. 12 of its statement of claim as follows:

(i) at the material time, the issuer SAP as well as D1 and D2 share the same holding or ultimate holding company in Oilcorp Berhad;

(ii) at the material time, Oilcorp Berhad, the issuer and both D1 and D2 have common directors;

(iii) the wrongful application of proceeds was admitted and acknowledged by Oilcorp Berhad, D1 and D2 and the common director of Oilcorp Berhad, the issuer and D1 and D2 ie, one Ng Huat Tian;

A (iv) in an attempt to remedy the wrongful application of proceeds, on or about November 2009, D1 and D2 had at the material time agreed to create legal charges over the lands in favour of the plaintiff for the amounts of RM14 million for D1's land and RM3 million for D2's lands; and

B (v) the legal charges were ultimately not created as D1 and D2 were unable to pay the then outstanding quit rent and assessment on their respective lands that would need to be settled to the local authorities first before the land authorities would register the charges.

C **[4]** The plaintiff further pleaded that there was a common intention amongst the plaintiff and D1 and D2 that the plaintiff was to have a legal and/or beneficial interest in the lands and that both D1 and D2 would hold their respective lands upon trust for the plaintiff for the respective sums of RM14 million and RM3 million wrongly applied to their lands. For the reasons aforesaid, the plaintiff argued that D1 and D2 are liable to the D plaintiff as constructive trustees of the plaintiff.

[5] The plaintiff's thus prayed for *inter alia* a declaration that D1 and D2 hold their respective lands in trust for the plaintiff and for consequential reliefs for the sale of the lands or the retention of proceeds of sale of the lands E to the amount identified as having been wrongfully applied to D1's land and D2's lands for payments over to the plaintiff. The plaintiff also prayed for an injunction to restrain D1 and D2 from disposing of their respective lands.

[6] D1 went into liquidation on 9 February 2012 before the charge of its land to the plaintiff as security for the repayment of the sum owing to it could F be created.

[7] It transpired that D1's land had since been sold for RM83 million to a third party and so the plaintiff prayed that D1 do pay or caused to be paid to the plaintiff in priority to all the other creditors of D the amount of RM14 million from the proceeds of sale of D1's land.

G **[8]** The defendants denied strenuously that they are holding their respective lands as constructive trustees for the plaintiff. They also denied having any knowledge of the so-called wrongful misapplication of the proceeds from accounts assigned to the plaintiff towards their lands instead.

H **[9]** In the course of preparation for trial, the plaintiff sought to introduce two letters which have the label 'without prejudice' written on it. The defendants vigorously objected to it for reasons canvassed below by them.

Prayers

I **[10]** There are two separate applications filed by D1 to exclude two different letters from the common bundle of documents ("CBOD") to be filed for the trial of the main action on the ground that the letters are marked 'without prejudice'.

[11] Enclosure 69 is an application by D1 to exclude a letter dated 24 November 2009 issued by one Oilcorp Berhad ("Oilcorp") to MIDF ("the Oilcorp letter") from the CBOD. It was copied to Bank Rakyat. Enclosure 100 is an application by D1 to exclude a letter dated 25 March 2010 written by MIDF to Oilcorp ("the MIDF letter") from the CBOD. The Oilcorp letter and the MIDF letter when referred to collectively shall be called 'the two letters'.

Preliminaries

[12] As part of the pro-active case management procedure found in the Rules of Court 2012 ("ROC") towards achieving a just, expeditious and economical conduct of a trial, parties will seek directions from the court with respect to filing the relevant bundle of documents. This is provided for under O. 34 r. 2(2)(i) ROC as follows:

> (2) At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceeding, including -
>
> (i) any party may apply at any time to the Court for directions as to the filing, bundling and organization of documents intended to be used at the trial of the action, and on such application, the Court may make such order or give such direction as is necessary to achieve the just, expeditious and economical conduct of the trial of the action.

[13] The plaintiff wanted the two letters included in the CBOD on ground that they are both relevant and admissible for the purpose of the trial and as D1 wanted them excluded from the CBOD, D1 had filed the applications for exclusion under O. 34 r. 2(2)(i) as well as under O. 92 r. 4 ROC and also by virtue of s. 23 Evidence Act 1950.

[14] Order 92 r. 4 ROC reads:

> Inherent powers of the Court (O.92 r.4)
>
> 4. For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[15] Section 23 of the Evidence Act 1950 ("EA") reads:

> In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

A **Principles**

Whether The Mere Label Of 'Without Prejudice' By Itself Is Sufficient To Exclude The Two Letters For The Purpose Of Trial

[16] The use of the label 'without prejudice' is common in many B correspondence between parties especially when there are terms of a settlement that are being proposed with parties posturing and positioning themselves and proffering options and concessions along the way. The law has thus developed that such communications made on a without prejudice basis shall be excluded from the evidence to be produced at trial if a C settlement does not materialise; otherwise no parties would want to negotiate at all for fear that what is proposed in the process of negotiation would be led in evidence by the party trying to gain an advantage to prove its case to the detriment of the other.

[17] Such a principle is well entrenched in many cases. Suffice to refer to D just a few here. The Federal Court in *Malayan Banking Bhd v. Foo See Moi* [1981] 1 LNS 95; [1981] 2 MLJ 17 speaking through His Lordship Chang Min Tat FJ said at p. 18:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but E to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

F **[18]** The *Malaysian Civil Procedure* 2013 at p. 533 under the heading 'without prejudice' correspondence (as it applies to O. 41 r. 6 of the Rules of Court 2012), succinctly summarised the state of the law as follows:

> Without prejudice negotiations are privileged and inadmissible without the consent of the parties, their agent or solicitors to the negotiations G (*Malayan Banking Bhd v. Foo See Moi* [1981] 2 MLJ 17,FC.) This rule is based on public policy to encourage parties to settle their disputes. (*Rush & Tompkins Ltd v. Greater London Council* [1989] AC 1280) ...
>
> Being inadmissible their inclusion in any affidavit is scandalous and will be struck out under the rule (*Oh Kuang Liang v. Associated Wood Industries* H *Sdn Bhd* [1995] 2 CLJ 961). The privilege belongs only to the parties involved in the negotiations (*Yeo Hiap Seng v. Australian Food Corp Pte Ltd & Anor* [1991] 3 MLJ 144).

[19] In *Rush & Tompkins Ltd v. Greater London Council* [1988] 3 All ER 737 at p. 740, the House of Lords reiterated this principle as follows:

I
> The rule applies to exclude all negotiations genuinely aimed at settlement ... if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those

> negotiations will, as a general rule, not be admissible ... if the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission …

[20] However, merely marking a document 'without prejudice' does not necessarily mean that the document will be excluded from admission as evidence as to its contents. There must be a dispute at the time the letter was issued and a genuine attempt to resolve it. In *Wong Nget Thau & Anor v. Tay Choo Foo* [1994] 4 CLJ 617; [1994] 3 MLJ 723, Ian Chin J explained it as follows:

> The fact that a document is headed "without prejudice" does not conclusively or automatically render it privileged … The court must, in deciding whether a letter marked "without prejudice" is admissible, consider whether the letter was part of a genuine attempt to settle a dispute … There was no dispute existing at the time of his said letter. Since there was no dispute, the letter of the said advocate was not written in an attempt to settle a dispute or in the course of negotiation. The letter of the said advocate is therefore admissible.

[21] In *Re Daintrey, ex p Holt* [1893] 2 QB 116 at 119-120, Vaughan Williams J held in clear and unequivocal terms that:

> In our opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation … unless there is dispute or negotiations and an offer the rule has no application.

[22] In *Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors* [1999] 2 CLJ 749; [1999] 5 MLJ 449, it was clarified that:

> Two common features must be present before this privileged communications could be activated:
>
> (a) some individuals must be in dispute and that dispute led them to negotiate with one another; and
>
> (b) the communication between the parties must contain suggested terms that would finally lead to the settlement of the dispute

[23] Conversely, a without prejudice communication even if not expressly stated to be such, would be precluded from being disclosed at a trial for so long as there were negotiations towards a settlement. *Sinojaya Sdn Bhd v. Metal Component Engineering Pte Ltd* [2003] 1 SLR 281 was a Singapore case which concerned without prejudice communications in the form of the minutes of a meeting to discuss settlement of the plaintiff's claim. There was no reference to the communications being on a without prejudice basis. The defendant took the position that the meeting was on a without prejudice basis and applied to strike out certain paragraphs in those affidavits which referred to the meeting and which exhibited the minutes.

[24] The Singapore High Court held in that case as follows:

(i) the intention of the meeting was genuinely to try and reach a settlement not only between the plaintiff and defendants but involving a third party as well. The defendants would not agree to pay the plaintiff without securing an agreement from the third party to pay the defendants in turn; and

(ii) the absence of any reference to the phrase 'without prejudice' was not therefore fatal to the defendant's position.

[25] Learned counsel for the first defendant, Mr Leong Kwong Wah, submitted that s. 23 of the Evidence Act 1950 is clear in that:

> In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

[26] According to him, there was no requirement that there must first be present a dispute and that there were negotiations directed at settling the dispute. Being a principle entrenched in a statute, one must not according to him, import words into the section which are not there.

[27] However, much water has flowed under the bridge where the interpretation of s. 23 Evidence Act 1950 is concerned. The learned authors of *Sarkar's Law of Evidence*, 14th edn 1993 vol. 1 at p. 359, when explaining the scope and excerptions of s. 23 of the Indian Evidence Act 1872 which is *pari materia* with our s. 23, opined as follows:

> *The rule, however, is strictly confined to case where there is a dispute or negotiation, and suggestions are made for the settlement thereof. Where this is not the case, … the sender of a letter cannot impose on the recipient any condition as to the mode in which it may be used, by marking it "without prejudice" or "private" or "private and confidential" …*
>
> In order that any admission may be shut out under the section there (1) must be an express condition to that effect (eg, communication marked "Without prejudice") or (2) though nothing was expressly said, there must exist circumstances which make it clear that it was so agreed and the offer was made only with a view to get dispute amicably settled at a sacrifice … (emphasis added)

[28] *Halsbury's Laws of Malaysia* vol. 21 2006 Reissue at p. 214 opined as follows:

> Section 23 merely states a broad principle and does not specify detailed rules. For this, we must look to English law. Sir James Fitzjames Stephen, who drafted the Indian Evidence Act 1872, (the direct parent of our Evidence Act 1950, originally enacted in 1893), also wrote a Digest of the Law of Evidence … and his art. 20 is, with immaterial differences, identical to our Evidence Act 1950 s. 23. In effect therefore, the English common law on 'without prejudice' statements in civil cases is part of our law.

[29] The above was based on the *dicta* of Coomaraswamy J in *A-B Chew Investments Pte Ltd v. Lim Tjoen Kong* [1989] 2 CLJ 1109; [1989] 2 CLJ (Rep) 840; [1989] 3 MLJ 328 at pp. 330 to 331 in the context of the Singapore Evidence Act and the Singapore law.

[30] The use of the label 'without prejudice' is not determinative that a document bearing that label would be inadmissible for the purpose of trial or that it will be excluded from the proposed bundle of documents to be filed for the trial. There must be present the *sine qua non* element of a dispute between the parties and an attempt towards settlement.

Whether There Was A Dispute Between The Parties When The Two Letters Were Written

[31] At the time the Oilcorp letter was issued purportedly on 25 November 2009, the MUNIF was not in default. So far as D1 is concerned, the plaintiff had only demanded for payment on 8 February 2013. The case of *Wong Nget Thau & Anor v. Tay Choo Foo* [1994] 4 CLJ 617; [1994] 3 MLJ 723 is in point where it was observed as follows:

> There was therefore no dispute at that time because the plaintiffs had not then demanded payment since payment was not then due.

[32] As the best context of any disputed admission of any part of a letter is the whole letter itself, the whole of the Oilcorp letter and the MIDF letter shall now be reproduced below for a proper assessment as to whether there was a dispute between the plaintiff and D1.

[33] First, the Oilcorp letter from Oilcorp to MIDF in exh. CCL2 in the affidavit in support of encl. 69 is reproduced below for its full term and effect:

> 24 November 2009
>
> MIDF AMANAH INVESTMENT BANK BERHAD
> Level 12, Menara MIDF
> 82 Jalan Raja Chulan
> 50200 Kuala Lumpur
> Tel : 03-2173 8888 Fax : 03-2173 8777
>
> Strictly Without Prejudice
> Private & Confidential
>
> Dear Sirs,
> OILCORP BHD ("OILCORP")
> STRAIGHT A'S PORTFOLIO SDN BHD ("SAP")
> MURABAHAH UNDERWRITTEN NOTE ISSUANCE FACILITY ("MUNIF") FACILITY OF UP TO RM200,000,000 ("SAP MUNIF FACILITY")
>
> We refer to the above matter and would like to thank you and your colleagues for your indulgence and continuing discussions with us. We act in good faith and are writing to MIDF Amanah Investment Bank Berhad as the Facility Agents for the SAP MUNIF Facility and accordingly, as agents for the Noteholders.

A As you are aware, Oilcorp Berhad ("Oilcorp") is currently formulating a restructuring scheme to address the financial position of the Group. As part of the restructuring scheme, Oilcorp and Oil-line Engineering & Associates Sdn Bhd ("OLEA") propose, on a strictly without prejudice basis, that the outstanding sum amounting to approximately RM80,000,000.00 ("the Sum") shall be settled in the following manner:

B

1. that a sum equivalent to RM21,000,000 be settled by the Noteholders and/or their nominees or agents accepting the rights to claim on invoices that have been issued by OLEA to Plant & Offshore Technology Sdn Bhd ("POT") amounting to RM21,749,055.32 and which have been assigned to the Trustee under the Assignment of Income and Receivables dated
C 26.3.2007 ("the Assignment");

2. that a sum equivalent to RM42,000,000 be settled by an assignment of the rights to claim on invoices issued by OLEA to Plant Biofuel Corporation Sdn Bhd ("PBC") amounting to RM48,256,976.58 ("the PBC Invoices"), which invoices remain due and outstanding to OLEA. We
D believe that we OLEA is entitled to assign these invoices to the Noteholders as:

2.1 pursuant to clause 3.1 of the Assignment, 'the Receivables' are charged and assigned to the Trustee as security for the SAP Munif Facility, which 'Receivables' are defined as being receivables in respect of 'the Acquired Invoices';

E

2.2 in turn, 'the Acquired Invoices' are defined as 'the invoices or receivables under all present and future contracts … of OLEA Group acquired or to be acquired ... by SAP'. This includes the PBC Invoices;

F

2.3 as such, it was always intended that the PBC invoices were to be assigned to the Trustee as security for the SAP Munif Facility. Indeed, under the Trust Deed constituting the Notes, the Assignment was to cover receivables including any variations or supplemental to invoices acquired; these PBC Invoices fall within that definition.

G

3. *We believe that a portion of the monies amounting to RM17,000,000 that were collected from PBC have been utilized to improve the properties owned by Oilfab Sdn Bhd and D'Tiara Corporation Sdn Bhd to the extent of approximately RM14 million and RM3 million respectively. We are advised that the Noteholders would be entitled to the said sums on the disposal of such properties. In the alternative, they would be entitled to a charge over the said properties to secure such amounts.*

H

4. While the above largely settles the full amount of the Sum, we are prepared to offer additional security for the SUM, comprising the following:

4.1 the invoices assigned to the Noteholders amounting to
I RM48,256,976.58 have been converted into preference shares in Renewable Fuel Corp Inc. ("RFC"), the ultimate holding company of PBC. In the circumstances, we are advised that the Noteholders would be entitled to the said shares to secure such amounts. We are prepared to provide such charge;

4.2 in the event the proposal listing of RFC on a stock exchange in the United States of America does not materialise by 19th July 2010, a transfer be made to the Noteholders, their nominees or agents of all the rights and benefits under the 2nd Debenture executed by Plant Biofuel Corporation Sdn Bhd dated 27.11.2008 in favour of OLEA.

Upon receipt of payment from 1, 2 and 3 above, the Noteholders, their nominees or agents shall discharge the securities provided in 3 and 4 above.

The above arrangement shall be understood to ratify all previous dealings with regard to the payment of the Sum and the receipt and use by the Oilcorp Group of the Invoices/Receivables assigned under the Assignment and the Acquisition Letter Cum Assignment and the Notice of Assignment. Please also take note that notwithstanding this proposal, we are also pursuing other avenues of settling the Sum due to you.

In any event, the above arrangement and proposal is subject always to the restructuring exercise to be undertaken by Oilcorp Group.

Thank you.

Yours faithfully,
OILCORP BERHAD
Sgd
.....(Illegible) .....

SUNNY NG HUAT TIAN
Group Managing Director

(emphasis added)

[34] I am persuaded by learned counsel, Miss S M Lim, for the plaintiff when she submitted what was patent and plain from the Oilcorp letter as follows:

(i) one Straight A's Portfolio Sdn Bhd ("SAP") admitted that it owed MIDF (and by extension, the plaintiff) approximately RM80,000,000;

(ii) there is no dispute as to whether SAP owed MIDF such amount and whether such amount was correct;

(iii) in fact, D1 has never averred in any of its affidavits on whether the amount owing was disputed at the time the Oilcorp letter was issued; and

(iv) Instead of paying amount outstanding in full immediately, SAP essentially sought the indulgence of MIDF in paying the amount owing by instalments, as evidenced by SAP's proposal to create various assignments of invoices and proceeds and additional charges.

[35] Whilst learned counsel for the plaintiff had submitted that there was an admission that a portion of monies amounting to RM17,000,000 assigned to the plaintiff had been misapplied to improve the lands of the defendants,

I am prepared to accept at face value what is stated in the said letter which is that a portion of monies had been applied or channelled towards improving the lands of the defendants. Likewise there is no dispute on the sum so applied or channelled or on the amount of the said sum of RM17,000,000.

[36] Then there was another separate letter from MIDF in the MIDF letter dated 25 March 2010 to Oilcorp Berhad marked as exh. CCL1 of D1's affidavit in support that reads as follows:

PRIVATE & CONFIDENTIAL WITHOUT PREJUDICE

Date : 22 March 2010

M/S Oilcorp Berhad
No. 2-2 Jalan SS 6/6
Kelana Jaya
47301 Petaling Jaya
Selangor Darul Ehsan

Dear Sir

OILCORP BERHAD ("Company")
APPLICATION UNDER SECTION 176(10) COMPANIES ACT, 1965 ("Act")

We are a creditor of the abovenamed Company and refer to our letter dated 12.3.2010 in relation to the above. We write to you on the assumption that you are duly authorised and/or have full capacity to liaise with us on behalf of Straight A's Portfolio Sdn Bhd ("SAP"), Oil-Line Engineering & Associates Sdn Bhd ("OLEA") and all other security parties including *inter alia* all assignor(s), charger(s) and/or guarantor(s), if any, under the Company's and/or SAP's respective facilities held with us.

By way of our letter above, we had expressed *inter alia* our no objection to the Company's application for a restraining order of not more than six (6) calendar months under Section 176(10) of the Act ("Application") and our approval to Ng Huat Tian to act as a director pursuant to Section 176 (10A)(d) of the Act.

We are informed however, that the Company's Application was recently rejected by Court for failure to obtain the minimum quota of support from its creditors pursuant to the Act.

Apart from the above, we would like to highlight that at present, **these matters remain outstanding:**

(1) *confirming or giving us particulars, including the exact sums of money and dates of each transaction, of misapplication of funds into inter alia a fabrication plant in Klang owned by Oilfab Sdn Bhd and enhancement of a piece of land in Negeri Sembilan owned by D'Tiara Corporation Sdn Bhd. In this regard we are given to understand that the funds were meant for a designated account as security for the Notes issued by SAP and of which OLEA is the assignor*;

(2) *the creation of additional legal charges in our favour in respect of the Klang land on which the fabrication plant sits and on the piece of land owned by D'Tiara Corporation Sdn Bhd subject to the value of the charge to be created. In the same vein, please clarify why the Company's proposal limits the value of the additional legal charges to RM13 million (sic) and RM3 million only as you had earlier proposed.*

For the reasons above, please note that the consent by our letter dated 12.3.2010 is hereby revoked with immediate effect. We may however reconsider any grant of consent upon review of the circumstances of the case.

In the meantime, we would require your urgent compliance of matter in (1) and (2) above.

In relation to the matter in (2) above, we are advised by our solicitors that they would require the following for the creation of the additional charges:

(a) original document(s) of title;

(b) Quit Rent and Assessment receipts;

(c) Certified true copy NRIC of the Company's signatories;

(d) the charger company's M&A;

(e) the charger company's Form 49 and Form 24;

(f) the charger company's latest annual returns; and

(g) the requisite resolution(s) of the charger company authorising the creation of the additional legal charges

We are given to understand that item (a) above is in the possession of the Security Trustee, i.e. OSK. In this regard, we would require the Company to immediately instruct and/or give authorisation for the Security Trustee to release the document(s) in item (a) or any other item listed above which is in their possession to us and/or our solicitors, Messrs Raja, Darryl & Loh posthaste.

Please note that we reserve our rights to take all appropriate action and/or proceedings against the Company, including *inter alia* opposing the Company's Application and/or any other application the Company may make at any Court, should the Company fail to revert within 7 days on the matters stated above.

Yours faithfully,
For MIDF AMANAH INVESTMENT BANK BERHAD
Sgd
(Illegible)

DATO' MEGAT HISHAM MEGAT MAHMUD
CHIEF EXECUTIVE OFFICER/DIRECTOR

(emphasis added)

[37] As can be seen as far as the amount owing from D1 is concerned, it is not in dispute that RM14 million is due from it to the plaintiff. It is common ground that the sum of 'RM13 million' in the MIDF letter is a typographical mistake. The language used in the Oilcorp letter is most conciliatory to say the least and reflects a genuine attempt to resolve the debt that has arisen. The fact that the noteholders and ultimately the plaintiff are entitled to a charge over the lands to secure the amounts channelled towards improvement of the lands is a point plainly made by Oilcorp.

[38] The fact of a charge having been prepared and signed by D1 appears in exh. 'CCL2' of the affidavit in reply of D1. The Form 16A of the National Land Code ("NLC") for the proposed charge was prepared by Messrs Raja Darryl & Loh ("RDL"). It shows that D1 agreed to create a legal charge over D1's land for the specific purpose stated to be:

> pembayaran balik hutang Straight A's Portfolio Sdn Bhd (No Syarikat: 755096-P) sebanyak Empat Belas Juta Sahaja (RM14,000,000-00) sahaja kepada MUNIF Noteholders (seperti yang didefinikan dalam Trust Deed bertarikh 26 haribulan Mac, 2007) mengikut peruntukan-peruntukan perjanjian Facility Agreement Murabahah Underwritten Notes of Up to RM200,000,000 bertarikh 26 haribulan Mac, 2007.

[39] The fact that the charge over D1's land was prepared and executed by D1 would lend credence to the assertion that there was a settlement arrived at in accordance with the terms expressed in the two letters.

[40] Whether or not one can then infer or prove a constructive trust is a different matter altogether to be determined at the trial. What we are concerned here in the exercise to admit the two letters is whether there was a dispute. Even assuming that there was a dispute, that has been resolved by D1 agreeing to execute the charge over its land in favour of the plaintiff. Whether the statements of Oilcorp on the plaintiff being entitled to a charge over D1's land is binding on D1 is a matter to be determined at trial and so is the assertion that a constructive trust has so emerged from the conduct of the parties.

[41] Clearly there is no hint of any dispute that the sum owing from D1 to the plaintiff is RM14 million. Even assuming for a moment that Oilcorp had not agreed on the details and the documents to be furnished, that at best can only go towards the mode of settlement of the debt and not the debt itself.

[42] Thus, in *Ted Bates (M) Sdn Bhd v. Balbir Singh Jholl* [1976] 1 LNS 157; [1979] 2 MLJ 257 at p. 258, the Federal Court held that:

> This [rule on without prejudice communication] has no application to a case where a man says he owes another a certain sum but merely asks for time to repay the sum. … The question of prejudice has no application unless a person is in dispute or negotiation with another at the time. (emphasis added)

[43] In that case, the respondent admitted owing the money and asked for time to repay. At p. 258 it was narrated as follows: A

> In a letter dated August 7, 1975, Messrs Dulip Singh & Co wrote to the appellants and the second paragraph reads:
>
> > We are instructed to state that our client is making arrangements to repay the said sum of $250,000.00. However, he shall be pleased if you will kindly permit him to settle the said sum within a period of five years upon his undertaking to pay interest on the said sum at the agreed rate. B

[44] I agree with the plaintiff that applying the *Ted Bates*' test, the following statements may be fairly made: C

(i) SAP (and by extension, the defendants) admitted that they owed the plaintiff the sum of approximately RM80,000,000 and that a sum of RM17,000,000 assigned to the plaintiff had been applied to improve the defendants' lands; and D

(ii) SAP (and by extension, the defendants) was not prepared to repay such sums in full, and sought for indulgence to repay the sums at a future date.

[45] Again, though the plaintiff had submitted that the said amount of RM17,000,000 had been misapplied, I am content to accept what is plainly stated in the Oilcorp letter which is that the said sum had been applied or channelled towards the improvements to the defendants' lands. E

Whether Negotiation To Settle Was On-going Or That There Was Clearly An Agreement To Pay

[46] Learned counsel Mr Leong for D1 had submitted that as the plaintiff had granted indulgence of nearly four years to the defendants, they were supposedly still trying to achieve an amicable settlement. However, I agree with Miss Lim for the plaintiff that the issue was never raised in any of the defendants' affidavits thus preventing the plaintiff from adducing any evidence in rebuttal. This is clearly a statement from the Bar and even accepting that there was indulgence of time to pay that by itself does not show that there is a dispute on the debt but at most only on the mode and manner of payment. Based on the Federal Court authority of *Ted Bates*, that granting indulgence of time to pay shows that there was in fact no dispute. F G

[47] Indeed, D1 did not state anywhere in its affidavits that the Oilcorp letter was made in the course of a negotiation to settle. The observation in *Halim Securities Sdn Bhd v. Ng Seng Boon (Lamp 16)* [1999] 1 LNS 309; [1999] MLJU 624 is relevant to the present case: H

> In the present case, *there is nothing disclosed in the defendant's affidavits that the letter exhibit TK-6 was written in the course of negotiations for settlement between the parties concerned. In the absence of evidence to the contrary, I am entitled to assume that the said letter was not made in the course of negotiations for settlement.* In the circumstances, there is no reason why it should not be admitted for consideration by the court. (emphasis added) I

[48] The following excerpt from the Oilcorp letter taken as a whole would lead one to fairly conclude that there was no dispute on-going but a settled roadmap ahead to ensure that a portion of the proceeds originally assigned to the plaintiff but instead had been used to improve the lands of the defendants shall be made good to the plaintiff in that it would be entitled to the said sums upon disposal of the lands in question and alternatively it would be entitled to a charge over the lands of the defendants to secure the sums used:

> Paragraph 1: "... would like to thank you and your colleagues for your indulgence and continuing discussions with us ..."
>
> Paragraph 2: "As you are aware, Oilcorp Berhad ("Oilcorp") is currently formulating a restructuring scheme to address the financial position of the Group. As part of the restructuring scheme, Oilcorp and Oil-line Engineering & Associates Sdn Bhd ("OLEA") propose, on a strictly without prejudice basis, that the outstanding sum amounting to approximately RM80,000,000.00 ("the Sum") shall be settled in the following manner: ..."
>
> Paragraph 4: "While the above largely settles the full amount of the Sum, we are prepared to offer additional security for the SUM, comprising the following: ..."
>
> Paragraph 6: "... Please also take note that notwithstanding this proposal, we are also pursuing other avenues of settling the Sum due to you ..."

[49] I could not agree more with the plaintiff that, Oilcorp in admitting that there is an outstanding sum and merely asking for time to repay or proposing ways on how the debt is to be settled or offering to fortify the facility in the light of the debt, the exception to the without prejudice rule would apply and that the two letters would be admissible.

[50] With that, the argument of D1 that there is no clear break in the chain of evidence between the Oilcorp letter and the subsequent MIDF letter would also fall as the Oilcorp letter is admissible and there is no evidence furnished by D1 that the MIDF letter is in response to the Oilcorp letter. Even if it is, the MIDF letter is nevertheless admissible as there cannot be said to be any dispute still on-going. A request for particulars of the misapplication of funds and the relevant documents for the creation of charges over the lands of the defendants cannot negate what had been agreed between the plaintiff and the defendants on the additional security to be furnished to the plaintiff by both the defendants. What needs tidying up is the logistic of getting the documentation perfected for the charges over the defendants' lands. As the MIDF letter was written in the context of a s. 176(10) Companies Act 1965 restraining order, Oilcorp Berhad as the parent company would be expected to give a full and frank disclosure to the court on the exposure and extent of indebtedness of the various companies in its stable and that would include the defendants as well. In striving to obtain such a restraining order, Oilcorp Berhad would have to get the consent of the creditors and the plaintiff did consent to the application for a restraining order as seen in para. 2 of the MIDF letter.

Whether The Plaintiff Is Estopped By The Previous Court Orders From Including The Two Letters In The Bundle Of Documents

[51] There were two previous orders of the court on an interlocutory application that came before the High Court and further on appeal to the Court of Appeal. The first order is that dated 9 April 2014 of the High Court in expunging the Oilcorp letter from the plaintiff's affidavit in support of its application for interlocutory injunction against D1. The second order is that of the Court of Appeal in dismissing the plaintiff's appeal against the order of 9 April 2014.

[52] It is pertinent to note and as pointed out by learned counsel for the plaintiff that the Court of Appeal in dismissing the plaintiff's appeal inserted a rider into the order to the effect that the order of the High Court of 9 April 2014 and the order of the Court of Appeal of 20 May 2014 shall not affect the admissibility of the Oilcorp letter in future proceedings and further that the parties are at liberty to raise the issue of admissibility of the Oilcorp letter in future proceedings. See exh. TC1 in the plaintiff's affidavit in reply for a copy of the Court of Appeal's order.

[53] D1 submitted that as the plaintiff's appeal was dismissed, the plaintiff is estopped from including the Oilcorp letter in the bundle of documents. However, it was D1 who had submitted in the Court of Appeal in the appeal against the order of the High Court dated 9 April 2014 that the appeal there is academic as the plaintiff is not precluded from arguing for the admissibility of the Oilcorp letter as evidence in the forthcoming trial. It was in that context that the Court of Appeal had dismissed the plaintiff's appeal.

[54] Far be it that it is the plaintiff that is estopped from raising the issue of admissibility of the Oilcorp letter, rather it is D1 that is estopped from asserting that the plaintiff cannot argue now for the admissibility of the said letter.

Whether The Fact That MIDF Had Sought Advice From RDL Would Give Rise To The Inference That Parties Intended That Evidence Of The Oilcorp Letter Would Not Be Given

[55] D1 submitted that there was a hand-written note on the Oilcorp letter that reads "copy to RDL seeking their view". 'RDL' of course refers to Messrs Raja Darryl & Loh, the solicitors then for the MIDF and also now for the plaintiff, the trustee for the noteholders MIDF and Bank Rakyat. D1 highlighted that there was no letter in reply from either MIDF or RDL that the continuing discussions were not genuine negotiations to resolve disputes. That coupled with the fact that there was no letter from either MIDF or RDL that the continuing discussions referred to in the Oilcorp letter were not on a without prejudice basis or to deny that MIDF had granted indulgence to the affected parties including D1 or further that the admissions by the defendants in item three of the said letter were not admissions on a without prejudice basis then the irresistible conclusion is that RDL must have advised

A MIDF and Bank Rakyat that the discussions referred to in the Oilcorp letter were genuine negotiations to resolve disputes and were conducted on a without prejudice basis.

[56] That, with respect, is a case of a fallacy founded on a faulty premise leading to a false conclusion. Clearly D1 in coming to such a conclusion was
B operating at the level of pure conjectures and speculations; both preconceived and misconceived. Whatever might have been the communication between a client and his solicitors, it is privileged and by virtue of s. 129 of the Evidence Act 1950, cannot be compelled to be disclosed to the court. Whilst it is true that the client himself may waive the privilege accorded to it by the
C law, until that is acceded to there is no room for any irresistible inference much less an adverse one drawn against the plaintiff.

[57] I agree with the plaintiff that it is trite that solicitor-client communications are privileged and thus, there cannot be any inference, favourable or adverse, drawn from the non-production of such communication.

D **[58]** No useful purpose may be served by venturing into the prohibited sphere of what is singularly privileged communication between a client and his solicitors. To come to the conclusions that D1 did would be to read into silence whatever the D1 wanted to hear leading to a false conclusion.

E *Whether The Delay In Filing This Action Is Because The Plaintiff Knew For A Fact That The Two Letters Are Inadmissible In Evidence Against D1*

[59] D1 said that there was inordinate delay of some four years in bringing this action, filed as it was in 2014 when the Oilcorp letter had been issued on 24 November 2009. Learned course Mr Leong submitted that one must
F not miss the significance of such slackness in suing as in the meantime, there was no payment whatsoever from SAP or D1 from the year 2010 to 2013 due largely to the fact that no legal action was commenced against SAP or D1 during those years. D1 then submitted that the irresistible conclusion arising no less from the guilty mind of the plaintiff must be that it knew all along from 2009 until 2013 that the Oilcorp letter and the MIDF letter were
G not admissible in evidence against D1.

[60] There is again a reading into the supposed inordinate delay of the plaintiff what the defendants want to see as supporting their theory that the plaintiff knew all along that the two letters are inadmissible. There is no
H merits in D1's arguments here supported as it is by D2.

[61] So long as the plaintiff has brought the action within time before limitation sets in, that would suffice. There is no suggestion here that the plaintiff's action is barred by limitation, founded as it is on a declaration of trust and consequential reliefs in enforcing the trust.

I **[62]** What is also relevant is that, this issue was never raised in any affidavits filed in relation to the applications to exclude the two letters from being included in the bundle of documents. The plaintiff had been prejudiced in that it had been precluded from replying and could only respond by way of its submission as to what has been theorised by the defendants.

Whether What Was Perceived By The Defendants As The Plaintiff's Reluctance To Disclose The Oilcorp Letter At The Earliest Opportunity To The Liquidator Of D1 Would Operate Against Its Admissibility Now

[63] It is true that the letter of demand dated 8 February 2013 from RDL to D1 for RM14 million did not disclose the Oilcorp letter and MIDF letter to the liquidator of D1. However, there is no merits and indeed it is misconceived for D1 to have asserted that the non-disclosure earlier in the plaintiff's application for leave in the winding-up court and in the current statement of claim gives rise to the irresistible conclusion that the plaintiff knew all along that the two letters were inadmissible as against D1.

[64] What is required to be included in a letter of demand is of course something left to the solicitors issuing it. A letter of demand sets out succinctly in a summary style the obligation of the recipient to pay and a demand for payment. It does not generally delve into the evidence that would have to be adduced should legal action be taken. The person demanded is of course at liberty to deny the amount owing and to ask for further documents to support and substantiate the claim if necessary.

[65] So too at the stage of getting leave from a winding-up court; all that is required is that the matter is not frivolous and that there is some *prima facie* evidence as to why the plaintiff should be allowed to sue D1 in liquidation. I agree that all the plaintiff needed to show for the purpose of leave is that further its intended claim cannot be dealt with adequately in the winding up or if the remedy it seeks cannot be given in a winding up proceeding. See *Mosbert Berhad (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446 at p. 447 and *Shencourt Sdn Bhd v. Perumahan NCK Sdn Bhd* [2008] 3 CLJ 582; [2008] 5 MLJ 191 at pp. 195 to 196. D1 is of course entitled to appeal against the leave granted by the winding-up court if dissatisfied with the decision. D1 did not do so.

[66] Likewise in the plaintiff's statement of claim, going back to basics, only so much as to material facts need to be pleaded and not evidence - O. 18 r. 7 ROC. Should D1 be so convinced that the plaintiff does not have a cause of action for breach of trust and to enforce the trust, D1 and for that matter D2 is at liberty to apply to strike out the plaintiff's claim.

[67] At any rate, the two letters are letters that would be in the possession of Oilcorp Berhad for having originated from them in the one and having received by Oilcorp for the MIDF letter in the other. D1 has both the prerogative and privilege of disputing the contents of those two letters as evidencing a trust and the plaintiff would have to call the respective makers accordingly for it to be admitted as evidence. In other words, the documents may be put in part C of the proposed bundle of documents and subject to strict proof as to its authenticity and contents.

[68] I further agree with the plaintiff that this issue was never raised in any affidavit of D1 in opposing the applications in encl. 69 and 100 and the plaintiff has been deprived of an opportunity to reply accordingly.

Whether There Was Material Non-disclosures And That The Plaintiff Did Not Come With Clean Hands

[69] Mr Leong for D1 argued that the plaintiff had failed to plead in its statement of claim a previous charge over D1's land and further that there was a redemption of this first charge by D1. Following that there was a refund by the plaintiff to D1 a sum of RM1,804,617.64 from the proceeds of sale of D1's land which was not pleaded. Absent from the pleading was also the non-disclosure of what action was taken by the plaintiff against SAP to recover the RM80 million following its notice of event of default dated 12 September 2012.

[70] It is not disputed as pleaded in D1's defence that the plaintiff was already the chargee of D1's land under Presentation No. 14032/05 in respect of an earlier *murabahah* notes issuance facility/Islamic medium notes facility of up to RM70,000,000 granted to Oilcorp Berhad ("first charge"). D1 argued that the plaintiff had allowed the redemption of the first charge on 2 October 2012 without demanding another RM14 million from D1. D1 has castigated as 'worse still', the fact of the plaintiff refunding to D1 a sum of RM1,804,617.64 being overpayment of the redemption sum. D1 then takes umbrage with the plaintiff's pleading at para. 13.1 of its statement of claim that D1 holds D1's land upon trust for the plaintiff to the value of RM14 million in that, if indeed, the plaintiff is the beneficiary of RM14 million held by D1 as trustee, then the plaintiff had every right to retain the overpayment. D1 then concluded that such a refund instead of a retention shows that there was never any trustee/beneficiary relationship between D1 and the plaintiff to begin with.

[71] Again, there was D1's familiar refrain that the irresistible conclusion is that the plaintiff knew all along that the two letters are not admissible against D1 and hence, it did not plead in its statement of claim the refund and hence it had failed to come to court with clean hands as it has to in seeking relief based on constructive trust.

[72] Such a confidence in coming to the conclusion that D1 did is misplaced; the conclusion itself being misconceived. As explained by Miss Lim for the plaintiff, the first charge was created as security of a bond issued by Oilcorp Berhad in favour of the plaintiff as trustee of the said bond issued. This is borne out from D1's own exhs. at CCL 6 and CCL 7 of D1's affidavit in reply. This bond issuance has nothing to do with the current action which has stemmed from a bond issued by another party SAP. There was thus no necessity to plead any particulars from the bond issued by Oilcorp Berhad which has nothing to do with the current action. The plaintiff, being the trustee for two separate bond issuances, cannot mix up the performance of its duties between the two different trusts.

[73] Is D1 saying what has not been said which is that had the plaintiff retained the access sum realised for the sale of D1's land to cover D1's obligation to repay the plaintiff, then D1 would have gladly allowed it and consented to it?! If that be so, then there is no need to fight tooth and nail against the admissibility of the two letters in the CBOD and the declaration of trust prayed for by the plaintiff. The plaintiff was careful and circumspect not to take any undue advantage from monies in its hand as it was acting as a trustee under two different trusts involving two separate bond issuers. Even if the plaintiff be uncharacteristically naive in the refund of the access sum to D1, that is no justification for D1 to then argue that there can never be a trust relationship in the factual matrix of the case. Whether or not a constructive trust has emerged from what the plaintiff pleaded as a misapplication of monies towards D1's land towards its improvement is something to be decided at the trial and not something that can be conclusively determined at this stage by reference to some inaction or action by the plaintiff.

Whether The Plaintiff's Notice Of Default Having No Reference To The Allegation Of Misapplication Of Funds Would Render The Two Letters Inadmissible For The Purpose Of The Current Claim

[74] It is true that the notice of event of default from the plaintiff to SAP is a straightforward if not sanitised form of a notice setting out the MUNIF issuances and the maturity dates and the amount due. It makes no difference and does not matter a jot if the proceeds or receivables meant to be ring-fenced in a certain master revenue account is not put in place or that the sums meant for the plaintiff had been applied and rechannelled to D1. One does not even have to debate on the misapplication of the funds at this stage because that is to be proved at the trial. What is relevant is whether the funds meant for the plaintiff had been applied towards the improvement of D1's land. Whatever has happened to the monies meant for the plaintiff does not change the fact that the payments under the various issuances are due. SAP's obligation to pay is irrespective of any misapplication of funds.

[75] For D1 to mount the argument that since the misapplication of funds is not mentioned in the notice of event of default, then it must mean that the plaintiff knew as a matter of fact that the two letters are inadmissible, would be to make a leap of logic devoid of any legal basis. In any event, this allegation was not raised in D1's affidavits and hence the plaintiff is at a disadvantaged in not being able to reply.

[76] There is no need to mention of any misapplication of funds at the notice of event of default stage and certainly no legal requirement to do that and hence this argument of D1 is completely devoid of merits.

Whether The Absence Of Any Mention Of Misapplication Of Funds In The Charge Form 16A Of The NLC Prepared By RDL Is Proof That The Plaintiff Knew That The Two Letters Are Inadmissible

[77] Mr Leong for D1 drew the court's attention to the fact that in para. 12.4 of the statement of claim, the plaintiff had alleged that in an attempt to remedy the wrongful application of proceeds, D1 had agreed to create a legal charge over D1's land for the amount of RM14 million. He further highlighted the fact that the charge in Form 16A did not state the purpose for which the plaintiff said it was created which is said to be to secure the payment of RM14 million misapplied by D1. The purpose of the charge appearing as exh. CCL2 in the affidavit in reply of D1 is stated as follows in its original language:

> pembayaran balik hutang Straight A's Portfolio Sdn Bhd (No Syarikat: 755096-P) sebanyak Empat Belas Juta Sahaja (RM14,000,000-00) sahaja kepada MUNIF Noteholders (seperti yang didefinikan dalam Trust Deed bertarikh 26 haribulan Mac, 2007) mengikut peruntukan-peruntukan perjanjian Facility Agreement Murabahah Underwritten Notes of Up to RM200,000,000 bertarikh 26 haribulan Mac, 2007.

[78] What is stated is not incorrect as it is not disputed that the sum of RM14 million is due from SAP to the plaintiff and the third-party charge from D1 is to secure the payment of this sum due. There is no legal requirement to state that there had been a misapplication of funds towards D1's land as what is important is the amount secured and the mode of security and not how the amount had come to be secured by D1. Under the Malaysian Contracts Act 1950, consideration can proceed from a third party and not necessarily the parties to the contract. Section 2(d) Contracts Act 1950 defines 'consideration' as:

> when, at the desire of the promisor, the promisee or **any other person** has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a **consideration** for the promise; (emphasis added)

[79] D1 then jumped to the conclusion that the absence of a reference to wrongful misapplication of the funds in this contemporaneous document in the Form 16A could only lead one to conclude irresistibly that the plaintiff and RDL knew all along that the two letters are not admissible against D1. To draw a connecting line between the non-mention of the misapplication of funds in the Form 16A and fact that the plaintiff and RDL knew all along the inadmissibility of the two letters would be to enter the realm of speculations and conjecture, yielding what is spurious and counter-productive.

[80] Ultimately at the trial, the plaintiff would have to show how the agreement by a third party in D1 to create a charge over D1's land would give rise to a constructive trust and the defendants would have every opportunity to refute this.

Whether The Absence Of Mention Of The Misapplication Of Funds In D1's Board Of Directors' Resolution For The Creation Of A Charge Over Its Land Is Proof That The Plaintiff Knew That The Two Letters Are Inadmissible

[81] Again at the risk of being repetitive, the same arguments apply here. It is true that the directors' resolution of D1 dated 18 August 2010 in exh. CCL1 in the affidavit in reply of D1 is stated that the charge to be created on D1's land was to secure a sum of RM14 million being a sum due and owing by SAP to MIDF and Bank Rakyat.

[82] There is no need for the plaintiff to protest against the resolution so worded as what is sought on a resolution is the proper authority of the directors to sign on behalf of D1 for the charge to be validly created. It is doubtful if D1 would want to give a differently worded directors' resolution capturing for posterity and perhaps even the police that the funds have been misapplied for the benefit of D1 when it was supposed to be ring-fenced for the benefit of the plaintiff as trustee for the noteholders.

[83] The plaintiff stated what it said is trite that where money of a person is misapplied to improve a land, the land is treated as being charged with the payment to the said person for the sum so misapplied. The case of *Boscawen and others v. Bajwa and another; Abbey National Plc v. Boscawen and others* [1995] 4 All ER 769 at p. 777 was cited as authority for the said proposition of law. Whether that proposition can succeed in the context of the particular factual matrix of this case and under the scheme of land registration under the NLC would have to be argued at the trial.

Whether The Failure Of The Plaintiff To Lodge Caveat Over The Lands Of The Defendants Is Proof That The Plaintiff Knew The Two Letters Are Inadmissible

[84] D1 was candid in stating that the second charge could not be perfected as D1 did not have the funds to pay the outstanding quit rent and assessment charges for D1's land. Subsequently on 9 February 2012, D1 was wound up in the Shah Alam High Court and a liquidator appointed over D1.

[85] There was no urgency in lodging a caveat as a consent order had already been entered into in respect of the injunction application filed by the plaintiff against D1 (encl. 7) to restrain and injunct D1 from dealing with the proceeds of sale of D1's land up to the amount of RM14 million. It is the plaintiff's prerogative as to whether to lodge a caveat over the defendants' lands in question and that cannot in any way affect the plaintiff's right as a beneficiary of a trust if the trust can be so proved at the trial. There is no nexus between the non-lodgement of a caveat and the so-called irresistible inference that the plaintiff must have known of the inadmissibility the two letters.

A

Pronouncement

[86] Having found that there were no disputes pending wherein negotiations were still afoot, both the Oilcorp letter and the MIDF letter are allowed to be included in the bundle of documents to be filed. One must resist the many irresistible inferences that the D1 supported by D2 have tried to prevail, but to no avail, upon this court to draw with respect to the plaintiff itself knowing that the two letters are inadmissible for trial.

B

[87] In the event that it is included as a part C document, then the relevant maker of the two letters have to be called to give evidence. The court hearing the parties will then decide at the trial on the weight to be attached to both the letters and to then finally decide based on the overall evidence adduced whether a constructive trust has been proved.

C

[88] Both the applications by D1 were thus dismissed with costs of RM5,000 each.

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